THE MANAGER, KINRARA ESTATE, PETALING POST

v.

K. GOVINDA PILLAI S/O KEERSARA PILLAI

HIGH COURT MALAYA, KUALA LUMPUR
TAN SRI DATO' HARUN BIN MAHMUD HASHIM J.
[ORIGINATING MOTION NO. 35 OF 1975]
28 JUNE 1994

LABOUR LAW: Section 77 Employment Ordinance 1955 - Appeal against decision of Labour Officer - Respondent, a rubber tapper, making complaint to Labour Officer for non payment of 6 days wages for May 1973 - Labour Officer deciding respondent entitled to wages pursuant to s. 16(1) of the Ordinance - Applicant ordered to pay respondent basic wages for 7 days - Applicant contending s. 16(1) not applicable to respondent - Whether respondent earns wages calculated by reference to the number of days' work performed in each month - Whether applicant offered respondent work on 24 days for month of May 1973 in compliance with s. 16(1) - Contention that contract of service deemed broken under s. 16(2) - Whether respondent estopped from making this claim - Consideration of s. 13(2) & s. 69 of the Ordinance.

This was an appeal pursuant to s. 77 of the Employment Ordinance 1955 (the Ordinance) from the decision of the Labour Officer, Selangor arising from a complaint under s. 69 of the Ordinance.

The respondent, a rubber tapper, in the employment of the applicant made a complaint to the Labour Officer that he was not paid 6 days wages for the month of May 1973. The Labour Officer decided that the respondent was entitled to such wages under s. 16(1) of the Ordinance and ordered the applicant to pay the respondent basic wages for 7 days. The applicant contended that as a tapper was allocated a task and allowed to complete the task in his own time, he was piece-rated and not daily-rated and therefore did not fall within s. 16(1). It was also contended by the applicant that the respondent was estopped from making this claim as under s. 16(2) of the Ordinance, as the contract of service was deemed to have been broken.

The question was whether the respondent earned wages calculated by reference to the number of days' work performed in each month and if so, whether the applicant had offered the respondent work on 24 days for the month of May 1973 in compliance with s. 16(1) of the Ordinance.

Held:

[1] The wage structure of the respondent under the contract of service with the applicant is governed by the MAPA/NUPW Agreement 1972 (the agreement) entered into between the Malayan Agricultural Producers Association (MAPA) of which the applicant is a member and the National Union of Plantation Workers (NUPW) of which the respondent is a member. Clause 11 of the Agreement provides, "A tapper shall be paid a basic wage of RM3.10 per day in the price zones of 35/40 cents and RM3.20 per day in the price zones of 40/45 cents and above for the performance by him of the full duties of a tapper on his task." The rate of wages prescribed is per day and clearly comes within the meaning of, "wages calculated by reference to the number of days' work performed in each month of his service..." Accordingly, s. 16(1) applies to the facts of this case.

[2] For the purpose of computing the 24 days, the proviso to s. 16(1) states that account shall not be taken of more than 6 days in a week which means that if a labourer works

on a Sunday it is not taken into account in computing the 24 days. In the present case, the respondent did not work on Sundays. So for the purpose of calculating the 24 days, he should have been offered work on May 9, 11, 14, 15, 18, 23, 26, 28, 31. However it rained on those days and therefore the applicant was unable to provide work. The provisions of s. 16(1) are clear and unambiguous. The applicant as employer shall nevertheless be bound to pay the respondent for the days it was unable to offer work and the respondent being willing and fit to work was entitled to such payment. Here he was only paid for 17 days in May 1973 and he was therefore entitled to be paid an additional 7 days as ordered by the Labour Officer.

[3] The respondent had the right to terminate the contract of service under s. 13(2) of the Ordinance. The operative word in s. 13(2) is **may** and it was entirely the respondent's choice whether to terminate the contract of service in the instant case. He had not done so and by remaining in service he was not estopped from making the claim under s. 69 of the Ordinance.

[Appeal dismissed with costs].

Legislation referred to:
Employment Ordinance 1955, ss. 13(2), 16(1), (2), 59(1), 69, 77

For the applicant - V.T. Nathan; M/s. Shearn Delamore & Co.
For the respondent - D.P. Xavier; M/s. Xavier & Vadiveloo

JUDGMENT

Harun Bin Mahmud Hashim J:
This is an appeal under s. 77 of the Employment Ordinance 1955 from the decision and order of the Labour Officer, Selangor arising out of a complaint under s. 69 of the aforesaid Ordinance.

The respondent is a rubber tapper in the employment of the applicant. He complained to the Labour Officer that he was not paid 6 days wages for the month of May 1973. In the event, the Labour Officer decided that the respondent was entitled to such wages under s. 16(1) of the Ordinance and ordered the applicant to pay the respondent the sum of RM20.40 being basic wages for 7 days. The applicant contends that s. 16(1) does not apply to the respondent. Hence this appeal. Section 16 provides:

> (1) Where a labourer is employed in any agricultural undertaking on an estate on a contract of service under which he earns wages calculated by reference to the number of days' work performed in each month of his service, his employer shall be bound either to provide him with work suitable to his capacity on not less than twenty-four days in each month during the whole of which he is so employed, or if the employer is unable or fails to provide work on twenty-four days in each month whereon the labourer is willing and fit to work, the employer shall nevertheless be bound to pay to the labourer in respect of each of such days wages at the same rate as if such labourer had performed a day's work:
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> Provided that any dispute as to whether a labourer was willing or fit to work shall be referred to the Director General for the decision:
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> Provided further that in computing twenty-four days for the purposes of this subsection account shall not be taken of more than six days in any week.
>
> (2) A contract of service shall be deemed to be broken by an employer if he fails to provide work or pay wages in accordance with subsection (1) of this section.

There is no dispute that the respondent is a labourer employed under a contract of service in an agricultural undertaking. The questions that arise are:

(a) Whether the respondent earns wages calculated by reference to the number of days' work performed in each month; and if so,

(b) Whether the applicant has offered the respondent work on 24 days for the month of May 1973.

The wage structure of the respondent under the contract of service with the applicant is governed by the MAPA/NUPW agreement 1972 (the agreement) entered into between the Malayan Agricultural Producers Association (MAPA) of which the applicant is a member and the National Union of Plantation Workers (NUPW) of which the respondent is a member.

The wage structure consists as follows:

1. A **basic wage** of RM3.10 or RM3.20 per day according to the prevailing price of rubber.
2. A price bonus of .05¢, .10¢, .15¢ or .20¢ per day according to the prevailing price of rubber.
3. An incentive bonus payment for latex brought in excess of a certain poundage fixed for different tasks and calculated on poundage.
4. A payment for scrap rubber also calculated on poundage basis.

The respondent is entitled to payment of the basic wage and incentive payments on a **washout day** when he is prevented by rain from completing his normal duties within normal working hours. He is also entitled to such payments (with adjustments and poundage rates and incentive bonus) on a day when tapping cannot commence due to weather condition but offered or allowed to commence **late tapping** after 10.00 a.m. but before 1.00 p.m.

Each tapper is allocated a **task** or tapping area. The task allocated is determined according to terrain, age of the trees and number of trees that a tapper is able to complete within normal hours of work each day. In respondent's case he was allocated two tasks, *viz.* Task 13 in field 1963 and Task 15 in field K. 12 - one high yielding and the other low yielding, each task to be tapped on alternate days. In practice he may complete his task in less than 8 hours (with a half-hour break for refreshment) or more than 8 hours. According to applicant's manager on the estate no employee worked more than 8 hours a day. Be that as it may, it is contended by the applicant that as a tapper is allocated a task and allowed to complete the task in his own time, he is **piece-rated** and not **daily-rated** and therefore does not fall within s. 16(1). I do not find merit in this argument. Clause 11 of the agreement provides:

> A tapper shall be paid a basic wage of **RM3.10 per day** in the price zones of 35/40 cents and **RM3.20 per day** in the price zones of 40/45 cents and above for the performance by him of the full duties of a tapper on his task.
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> [Emphasis supplied]

The rate of wages prescribed is **per day** and clearly comes within the meaning of:

> **wages calculated by reference to the number of days' work** performed in each month of his service...

in s. 16(1). I accordingly hold that s. 16(1) applies to the facts of this case.

a It is common ground that the respondent's basic wage for the month of May 1973 was RM3.20 per day. In that month he worked 17 days as follows:

Monday		7*	14	21*	28
Tuesday	1	8*	15	22*	29*
Wednesday	2*	9	16*	23	30*
Thursday	3*	10*	17*	24*	31
Friday	4*	11	18	25*	
Saturday	5*	12*	19*	26	
Sunday	6	13	20	27	

b * days worked by respondent.

c On the days not worked, excluding Sundays, it rained. The respondent was paid 18 days wages, i.e. for the 17 days he actually worked and for 1 May, it being Labour Day and a paid public holiday.

Section 59(1) of the Ordinance provides that every labourer is entitled to a rest day in each month. This provision is reiterated in Clause 34 of the agreement. Sunday is the rest day on applicant's estate. However, for the purpose of computing the 24 days, the d proviso to s. 16(1) states that account shall not be taken of more than 6 days in a week. What this means is that if a labourer works on a Sunday (at double rate as provided for by Clause 38 of the agreement) such day worked is not taken into account for the purpose of computing the 24 days. In the present case, the respondent did not work on Sundays. So for the purpose of calculating the 24 days, he should have been offered work on May 9, 11, 14, 15, 18, 23, 26, 28, 31 (nine days in all out of which seven days could have been e selected. Unfortunately, however, it rained on those days and work could not be offered and therefore the applicant was **unable** to provide work. The provisions of s. 16(1) are clear and unambiguous. The applicant, as employer, shall **nevertheless be bound to pay** the respondent labourer for the days it was unable to offer work and the respondent being willing and fit to work was entitled to such payment. Here he was only paid for 17 days in the month of May 1973 and therefore is entitled to be paid an additional 7 days f amounting to RM22.40 as ordered by the Labour Officer. The payment for Labour Day is excluded from the computation under s. 16(1), it being a paid public holiday.

Lastly, it is contended by the applicant that the respondent is estopped from making this claim as under s. 16(2) the contract of service is deemed to have been broken. It is true that the respondent has the right to terminate the contract of service under s. 13(2) which reads:

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> Either party to a contract of service may terminate such contract of service without notice in the event of any wilful breach by the other party of a condition of the contract of service.

I am in agreement with the Labour Officer, who held that the operative word is **may** and that it was entirely left to the respondent whether to terminate the contract of h service in the instant case. He has not done so and by remaining in service he is not estopped from making the claim under s. 69 of the Ordinance. Any other interpretation of s. 13(2) would lend violence to the language of that subsection as the nature of complaints that could be made under s. 69 invariably involves, as here, a breach of the contract of service and would render that section redundant.

i For the reasons stated, I dismiss this appeal with costs and confirm the order of the Labour Officer.